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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased,

Petitioners,

*v.*

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONERS

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### Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 14) is reported in 52 Fed. Supp. 704. The opinion of the Circuit Court of Appeals (R. 24) is reported in 144 Fed. 2d 373.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 28). The petition for a

writ of certiorari was filed on November 24, 1944, and was granted on February 12, 1945 (R. 29). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

## Question Presented

Whether, for the purpose of calculating an estate tax, the "death benefits", payable to the decedent's wife under two contracts (one for insurance on the decedent's life and the other a so-called annuity, the death benefit being practically separable from the decedent's annuity), issued concurrently by an insurance company to the decedent's surviving wife almost five years before his death and never owned by the decedent, form part of the decedent's gross estate where (1) at any time during the decedent's life the wife might, as to either or both of the contracts, have freely and unrestrictedly surrendered, assigned, pledged or amended them, taking the proceeds as her sole property, but where (2), if the wife, while still retaining any interest in the contracts, had died before the decedent, that interest would have passed to the decedent.

## The Statutes Involved

The question is on the interpretation of Section 302 (c) of the Revenue Act of 1926, as amended [Internal Revenue Code, Sec. 811 (c)]. It is printed (the pertinent parts in italics) with the related Regulations beginning with page 24, *infra*.

## Statement

All the facts are stipulated (R. 7, 13) and so found (R. 19). They are:

The death of the decedent, Morris L. Goldstone, occurred on February 23, 1938 (R. 8), and the petitioners are his executors.

On June 29, 1933, the Equitable Life Assurance Society ("the Society") issued two contracts, each for a single premium then paid. Both contracts were "rewritten", one on July 27, 1933, and the other on August 17, 1933; but it is agreed that such rewriting did not involve any "substantial change" (R. 8, 9). One contract insured the life of the decedent. The other had certain annuity features. As both will be analyzed immediately below, a further description at this place would merely lead to repetition.

The insurance company did not require a physical examination of the decedent in writing the life policy in view of the simultaneous issue of the annuity contract (R. 9).

The decedent's wife (designated Purchaser of one contract and Owner of the other) survived the decedent and had not availed herself of any of the rights (described below) with which the contracts invested her (R. 6, at par. 4; R. 9, at par. 10). Both contracts were in full force and effect at his death.

The Commissioner included the amounts payable to the wife under both contracts in the decedent's gross estate. The petitioners paid the resulting tax under protest and, their claim for refund having been rejected (R. 9, at par. 11), they instituted the present suit to recover the amount, $5,376.11 with interest (R. 13).

## The Contracts

By stipulation, photostatic copies of each of the two contracts will be handed to the Court. Those portions which the petitioners regard as pertinent are printed for the Court's convenience in appendices 2 and 3 at pages 28 and 32, *infra*.

*The insurance policy.* The Society, for a consideration of $14,357.08, a single premium paid by the decedent's

check, agreed to pay upon the death of the decedent the sum of $18,928.00 to certain beneficiaries named in a special provision attached opposite the Second Page of the policy, *i. e.*, to his wife, if then living, or otherwise to his two daughters.

The wife is designated as the Owner throughout the contract. It was issued to her and not to the decedent. By it she had these broad powers:

(a) To change the beneficiary without the consent of the decedent (lower half of Fourth Page);

(b) To surrender the contract or assign or pledge it, all without the consent of the decedent or of any beneficiary or of any possible subsequent owner, or she might change the form or plan of insurance. An assignment by her would "operate to exclude any and all rights of the insured, special beneficiary or any subsequent successive owner under this policy * * *" (lower half of Fourth Page);

(c) Upon her surrender of the contract she might herself receive the specified cash value (middle of Fifth Page);

(d) She might borrow from the Society on the security of the policy (top of Fifth Page);

(e) She might exercise the option of having the dividends paid in cash to her or accumulate them at interest to purchase additional insurance, and, in any case, receive the cash to her own use or surrender the additional insurance and receive its value to her own use (Third Page);

(f) She might elect a mode of settlement.

If the contract should not have been surrendered or assigned, pledged or otherwise alienated by her during her lifetime, then upon her death, the decedent still surviving, he would have become the owner in her stead (Clause "Successive Owners" at top of Second Page).

The wife survived the decedent without having exercised her rights to surrender, assign, alter or encumber the policy.

*The annuity.* This was issued to the wife for a single premium of $12,142.92, paid by the decedent's check, and combined several features.

The wife is described throughout as the Purchaser of the contract and in her reside the important rights summarized below; but a stated annuity of $386.51 per annum was to be paid to the decedent during his life, subject to the reduction noted below. Upon the death of the decedent (referred to in the contract as the Annuitant) a so-called "Death Benefit" of $6,071.46 was to be paid to the wife; but this she might obtain at any time during the decedent's life, without his consent or any condition whatsoever, upon her surrendering the contract.

The wife (Purchaser) had the following inherent rights:

(a) To surrender the contract to the Society "without the consent of the Annuitant or beneficiary" at any date upon which an annuity payment should be due whereupon the Society would "pay to the Purchaser (the wife) the cash surrender value of an amount equal to the Death Benefit" and issue a separate annuity contract to the decedent by which for the balance of his life he would receive an annuity of $280.26 a year instead of the $386.52 provided in the original contract (beginning at lower half of First Page);

(b) Subject only to the Society's approval, to "change to another form or plan of contract";

(c) Change the beneficiary or assign the contract (top of Second Page);

(d) Receive to her own use the dividends or allow them to accumulate (top of Third Page);

(e) Borrow money on the security of the contract (middle of Third Page);

(f) Choose a mode of settlement (Fifth Page);

(g) By assigning the contract, exclude any and all rights of any beneficiary or Annuitant under the contract" unless the wife (Purchaser) should choose to reacquire it (Upper half of Second Page).

If the wife should not exercise her rights to change, assign, surrender or otherwise alienate or burden the contract during her lifetime, then, if the decedent should have survived her, he would have acquired her rights (top of Second Page). The surviving wife had not changed, surrendered, assigned or encumbered the contract.

## The Holding Below

The Circuit Court of Appeals recognized that none of the beneficiaries in the cases which it thought governed its decision "had powers like those conferred upon the wife here" (R. 27); and it summarizes, immediately following this sentence, some of her rights under the contracts which we have noted above. Notwithstanding them, however, it considered that the decedent had an "unrealized possibility of reverter" and that therefore his death "terminated all his rights and enlarged those of his wife." Although full proceeds of the contracts were available to her without her husband's consent during his lifetime,

> "No part of the proceeds which the wife received came to her through the exercise of her powers under the contract" (R. 27).

This last sentence, we submit, embodies a substantial error, placing the emphasis as it does, not upon the passing of an economic benefit, but upon a change in legal terminology as the basis for taxation.

## Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In holding that the proceeds of the two contracts were part of the decedent's gross estate;

(2) In holding that the widow's ownership of the contracts was incomplete during the decedent's life but that she held them by virtue of a transfer of them to her "intended to take effect in possession or enjoyment at or after his death";

(3) In affirming the judgment of the District Court.

## Summary of Argument

The estate tax, being constitutional only as an excise upon the passing of the decedent's property, can apply only to that in which he had an interest at his death. Section 811(c) of the Internal Revenue Code enumerates the circumstances by which a decedent who has transferred property in his lifetime still retains an interest in it at his death sufficient to retain it within the orbit of the taxing power. Where, as here, no *right* rests in him to acquire in the future an interest in the property at his own volition, or to control its disposition, or to be vested with it upon the happening of any contingency, or to enjoy the income from it, he has no property interest in it at his death which can justify the application of the taxing statute. A possibility of benefit, depending not upon a contingency no matter how remote nor upon his own volition but solely upon the uncontrolled whim of an adverse party, is no tie to the property which his death serves to sever.

## Argument

The proceeds of the contracts cannot be included in the decedent's gross estate since at his death he had neither property rights in them nor control over them nor any future interest which his death served to release.

### I.

The estate tax statute, being justified under Article I, Section 9, of the Constitution only as an excise or duty upon the devolution of a decedent's property, cannot be construed as applying to an item in which the decedent had no recognizable rights.

*New York Trust Co.* v. *Eisner,* 256 U. S. 345.

Section 302(c) of the Revenue Act of 1926 sets forth those ties which, if retained by a decedent who has transferred an interest in his property during his life, will render the property a part of his gross estate at his death for estate tax purposes.

If the transfer has left in the decedent no relationship to the property which only his death will suffice to sever, there is nothing to which the tax can apply.

*May* v. *Heiner,* 281 U. S. 238.

If, however, a transfer, instead of being absolute, was not "to take effect in possession or enjoyment" before his death or if he *retained* the possession or enjoyment of it or the *right* to the income from it for his life or for a period ascertainable only with reference to his death or for a period in fact not ending before his death, there are outstanding ties which permit the inclusion of the property in his gross estate at death.*

Did any of these ties exist?

* There is no contention that there was here a transfer in contemplation of death, or that a right was reserved to designate beneficiaries.

## II

**The decedent had not made a transfer "intended to take effect in possession or enjoyment at or after his death."**

In support of this we urge these considerations:

(a) The contracts had never been the property of the decedent. They were originally issued to the wife. Where there is no transfer, there can be no reversion or possibility of reverter or chance of *revesting* of what has never been divested. In the words of Mr. Justice Douglas in *Helvering* v. *Wood*, 309 U. S. 344, at page 347:

> **"For, generally speaking, the power to revert or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate."**

True the checks of the husband paid the single premium (R. 8, 9, fol. 12) when the contracts were issued almost five years before his death. If that transaction was taxable it was as a gift. The question whether what the money bought was always the absolute property of the wife is not affected. The District Judge went so far as to conclude, apparently, that any *inter vivos* transfers of insurance policies* by a man "to the natural objects of his bounty" are to be condemned "as exact substitutes for a will" (R. 17). We submit the law does not support this (*Bingham* v. *United States*, 296 U. S. 211, 217). A gift tax, in case of an absolute transfer, might be laid, but the estate tax statute could not be invoked.

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* The lower court noted (R. 25) that no question of insurance was involved. *Helvering* v. *LeGierse*, 312 U. S. 531, seems to have largely lost its significance since the $40,000 insurance credit was erased by the Revenue Act of 1942. It was never important here, the $40,000 credit having already been absorbed. And the amendment of section 302(g) by section 404(a) of the Revenue Act of 1942 by which controlling importance is attached to who pays insurance premiums, the grantor or the grantee, would not here apply, even if the contracts dealt with insurance: the amending Act is expressly prospective (subd. (c) of the amending statute).

If it be argued, however, that the gift of the consideration for the contracts is equivalent to a gift of the contracts, the question remains whether there can be a reversionary interest in the contracts of which the decedent was never the owner. Basically, had the decedent any rights in them which were relaxed by his death?

(b) The title in the wife did not rest uncompleted until the decedent's death.

The wife was the absolute owner from the creation of the contracts. Without repeating here her rights summarized at pages 4-6, *supra*, it is enough to recall that she possessed the sole power, without the approval of the decedent or anyone else, to surrender the contracts at any time during the decedent's life and appropriate the surrender value—specified by table in the life policy; in the annuity contract, the full "death benefit"—to her own use. Likewise, subject only to the Society's approval, she might change the annuity "to another form or plan of contract" or surrender it and thus stop the annuity. When she chose to take any of these steps, the contracts as such would become extinct. The decedent had no right to prevent. What he had was at best a hope that, if he outlived her, he might not nevertheless have been excluded by her free act.

> "Property may be classified as real or personal or mixed, and as tangible or intangible. But the right in property of all classes is one, and consists ultimately of this, and only of this—the right to exclude others."

(Baker, C. J., at page 671 of *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 279 Fed. 648, cert. den. 257 U. S. 657.)

The right to exclude was hers and never the decedent's.

Was the court below, under these circumstances, justified in regarding "possession or enjoyment" postponed?

We are aware that the decisions of this Court clearly display a tendency to recognize a constantly more tenuous relationship of a decedent to property transferred by him in his lifetime as sufficient to defer its "possession or enjoyment" by the transferee until his death. A detailed review of the cases illustrating the progressive diminishing of the required tie would doubtless be of no help, so recent have been the latest developments. A brief account should serve.

In *May* v. *Heiner* (281 U. S. 238) the decedent had created a living trust with two successive life estates, of which the settlor was to enjoy the second.* At the termination of the two lives, the corpus vested in the settlor's children. The corpus was excluded from the settlor's gross estate upon her death, Mr. Justice McReynolds writing at page 243 for the unanimous Court:

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed."

This bald statement of the rule seems to have been unquestioned. But the need for further interpretation arose where less than full interest in the property had been "definitely fixed".

In *Chase National Bank* v. *United States*, 278 U. S. 327, the decedent had procured an insurance policy on his life, with benefit payable to another and had reserved the right to change the beneficiary. No authority was lodged in anyone but the decedent to alter the policy. Mr. Justice Stone stated the question to be whether

> "the termination at death of that power [to change the beneficiary] and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax."

* Of course, the Joint Resolution of March 3, 1931, would have dictated a different result if then applicable; but the fundamental conception seems unaffected.

On this he had to say at page 335:

> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. L. ed. 920, 46 L. R. A. (N. S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14, Consol. Laws, Sec. 52; Kittle v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

In *United States v. Jacobs*, 306 U. S. 363, the tie that was severed by the death of the decedent was his joint ownership of the property with his wife.

In *Klein* v. *United States*, 283 U. S. 231, a life estate in real property was granted to the wife, her acquisition of the fee being conditioned upon her surviving the grantor. As SUTHERLAND, J. remarked at page 234:

> "Nothing is to be gained by multiplying words * * *. It is perfectly plain that the death * * * brought the larger estate into being."

*Tyler* v. *United States*, 281 U. S. 497, had to do with an estate by the entirety. In the words of Mr. Justice SUTHERLAND, only upon the husband's death

> "she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will."

This Court has recently re-announced the test. Thus in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, decided on February 5, 1945 (Reported in Law. ed. Advance Opinions No. 8, at p. 511), where the question was as to the value for tax purposes of the property, Mr. Justice Murphy justified the application of the estate tax in these words:

> "* * * Thus until the moment of her death or until an undetermined time thereafter the decendent held a string or contingent power of appointment over the total corpus of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability" (p. 513).

And further:

> "* * * It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries * * *" (p. 513).

In the companion case of *Commissioner* v. *Field*, decided the same day and printed at page 514 of the same Advance Sheets, Mr. Justice Murphy expressed it as follows:

> "* * * Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly" (p. 515).

Not so clear was the situation where, although a complete present title was transferred, a possibility remained that, upon a contingency, the subject of the transfer might revert to the transferror. By a divided Court, a trust corpus, of which the settlor's daughter was to have the life estate with remainder over provided the daughter outlived the settlor, but with a reversion to the settlor if the daughter died before him, was declared a part of the set-

tlor's gross estate upon his death (*Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39).

The present Chief Justice, in his dissenting opinion in that case, foreshadowed the next step, writing at page 47:

> "He did not wish to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter."

The next step was *Helvering* v. *Hallock* where the minority view in the *St. Louis Union Trust* case became definitely the position of the Court. There (309 U. S. 106), in three typical cases, nothing remained to complete the transfers as such in the decedent's lifetime; but there was a provision that upon a contingency the title, now fully out of his ownership, might revert to him. This was deemed (by a divided Court) to delay the "possession or enjoyment" until the grantor's death.

We believe a still further advance has been made in the *Fidelity-Philadelphia Trust Company* case, cited on page 13, *supra;* for where, in his dissenting opinion in the *St. Louis Union Trust Co.* case, Chief Justice Stone thought "the *value of that interest* [a contingent reverter] was rightly subjected to the tax" (p. 46) and "the *extent to which it is incomplete* marks the extent of the 'interest' passing at death, which the statute taxes" (p. 47), it has now been declared that includible in the gross estate is not only "the extent of the 'interest' " but the entire *res* of which the interest was a calculable part.

Further, we believe, the Court has not gone.

Can it proceed further, subjecting to the taxing power assets of the decedent transferred during his life with no power of recall, no expectation of revesting upon a contingency, with nothing but a hope in the generosity of one

with an adverse interest? Would not such a holding depart from the province of levying an excise on property passing from a decedent and amount to an invasion of the forbidden field of a direct tax upon property without reference to population?

Summing up the substance of the law on this subject the learned author of Paul, *Federal Estate and Gift Taxation* (1942), has this to say (Vol. 1, p. 293, par. 7.04):

> "The principle is generally accepted that under an estate tax something must be transferred, or pass, or terminate at death to serve as a justification for the excise tax taken from the estate."

Recognizing the rapidly expanding area covered by the Court's progress, he adds at page 297 of the same volume (par. 7.05):

> "In other words, we may soon come to a day when the estate tax is interpreted as placing a death tax upon all property once in a generation."

That day, so far as the books show, is not yet here (Cf. Frankfurter, J., at p. 538 of *Whitney* v. *State Tax Commission*, 309 U. S. 530).

The gift tax, supplementing its related estate tax, can close all gaps without resorting to a distortion of the latter into something banned by the Constitution. This has been frequently recognized.

> *Milliken* v. *United States*, 283 U. S. 15; Stone, J., at page 23.

Returning to the facts here presented it will be profitable to compare positions just prior to the decedent's death and immediately after that event.

At any time prior to his death, by the wife's uncontrollable act, she could have surrendered the annuity contract and received the sum of $6,071.46, the precise amount which was available to her after his death.

So just before his death she could have surrendered the life contract and obtained the full surrender value which, with accumulated dividends, amounted to $14,037.53. True, the face of the policy was $18,928; but the discrepancy between the value of the policy, when it matured by his death, and the surrender value prior to his death, does not reflect upon the quality of her title: where a policy is wholly owned by one other than decedent, no part of the proceeds forms part of the latter's estate even though the incident of the death may increase the value of the asset. (*Bingham* v. *United States*, 296 U. S. 211).

It is "the shifting of the economic benefits of the property which is the real subject of the tax." (STONE, J. at p. 338, *Chase Nat. Bank* v. *United States*, 278 U. S. 327).

> "Taxation, as it many times has been said, is eminently practical * * *." (SUTHERLAND, J. at p. 503 in Tyler v. United States, 281 U. S. 497.)
>
> *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270.

This outlook upon taxation would seem to be at variance with the view of the court below which moved it to approve the tax in the instant case. It wrote that, even though the economic benefits were recognized as the same before and after the death of the husband,

> "No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts". (R. 27).

Although the economic benefit was not shifted by his death, the Circuit Court of Appeals thought, as we understand it, that the proceeds were taxable only because a different legal nomenclature was permissible.

We submit that this is a technical consideration which does not even approach the inquiry. If the test is whether the husband at the time of his death had any rights to prevent a realization by the wife of the full benefits of the contracts and if it appears that he had none, the property

can form no part of his estate merely because the title, already absolutely in the wife, received a new name at his death.

(c) What was unrestrictedly available to the wife was her property and not his. A strong illumination is cast upon the problem, we think, by considering the result in this case if the wife had died before the husband. It seems clear that these contracts would have formed part of her gross estate under subdivision (a) of section 811 of the Internal Revenue Act; for it has never been doubted that what is available to a decedent at the time of death is as much an asset of the estate as if it had been reduced to possession.

*Mayer* v. *Reinecke*, 130 Fed. (2d) 350.

It is *her* death that would have cut the tie.

> "* * * And the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." (STONE, J., in Chase National Bank v. United States, 278 U. S. 327 at p. 358.)

And compare in this connection the words of the Chief Justice in the same case at p. 335, quoted on p. 12, *supra*.

This conclusion in itself must exclude the property from the decedent's estate.

(d) The decision is not controlled by *Helvering* v. *Hallock*, 309 U. S. 106.

That case has had a powerful influence in drawing into its wake situations to which it may never have been intended to apply. The pattern specifically before the court was that of an *inter vivos* trust for the benefit of A for life with remainder to B if surviving or, if not, to the grantor. There would be no reversion unless the grantor survived the remainderman. By the prior death of the grantor, the possibility of a reversion was extinguished; and this tie which was cut at the grantor's death, freeing the property from the possibility of reverting, was held to

be such a retention of an interest in the property by the grantor as brought it within the purview of Section 811, subdivision (c).

Was it the intention of the Court to abandon wholly the line of opinion of which *May* v. *Heiner,* 281 U. S. 238, may represent the broad basis and to include in a gross estate property for which the decedent, while having no control over it or future legal right depending on any happening, might yet have entertained impotent hopes?

If the answer is affirmative, the results are astounding. Parallel would be the instance where the decedent at his death was named the specific legatee in the will of one yet living, conditioned upon his surviving the testator, of a jewel he had once presented to the testator. Here too his "right" would depend upon a contingency (survivorship) and a hope (failure of the testator to revoke the legacy or to alienate the subject of the legacy before death). Is the inchoate bequest a part of the decedent's estate? The answer seems obvious. No more substantial seems the relation of this decedent to the property, depending as it did upon his surviving his wife and her choosing to remain inactive in destroying the substance of the contracts.

The Circuit Court of Appeals from which this record has been certified seems itself to have reached a conclusion inconsistent with that here under review in its affirmance without opinion (138 Fed. 2nd 512) of the Board of Tax Appeals in *Commissioner* v. *Estate of Ballard* (47 B. T. A. 784). The Court of Appeals for the Third Circuit (*Lloyd's Estate* v. *Commissioner,* 141 Fed. 2nd 758), in a careful and exhaustive opinion by Jones, C. J., expressly found that a *trust res* was no part of a decedent's estate where he had granted the life tenants a power of appointment, only upon non-exercise of which and possible failure of an alternative remainder would the corpus revert to the grantor. The doctrine of *Helvering* v. *Hallock* was deemed not to reach to property, th future enjoyment of which by the grantor-decedent was to rest

upon whether or not a life tenant chose to exercise his appointive power.

And the Board of Tax Appeals in a case wholly parallel to that at bar (*Estate of Henry* v. *Commissioner*, B. T. A. docket #109513), has taken the same view.

It is urged that no warrant exists for an extension of the doctrine to new fields, unnecessary to invade and destructive of constitutional safeguards.

(e) The Circuit Court of Appeals wrote with respect to the powers possessed by the wife:

> "If the powers are significant for any purpose, they merely add to the remoteness of the contingency upon which the *Hallock* doctrine depends."

We submit that no question of remoteness properly enters into the matter. The conception cannot be invoked except with respect to a contingency. A contingency is defined as a "possibility of happening" (Standard Dictionary). Neither in a legal nor every day sense is the exercise of the volition of a rational being a contingency. Here, the hope that the decedent might some day come into ownership of the contracts was conditioned upon his surviving his wife (a true contingency) plus her choosing to refrain from destroying the contracts during her lifetime (an act of conscious volition).

Thus, it was not a matter of his possessing a right which was remote. He had no right; for it was she and not he that possessed all the means of domination.

## III

### The decedent had not retained "the right to the income from the property".

The only contract which need here be considered is the so-called "annuity", No. 9,168,544. Obviously, there is no

trace of income for the decedent in the life contract, since the dividends were payable to the wife from its creation.

It has been noted that the annuity contract is sharply divisible into its two independent features. The wife may, without fear of restriction, surrender the contract at any time and receive for herself the same sum (denominated a "death benefit") during the decedent's lifetime that she was entitled to receive upon his death. Thereupon a fresh annuity contract would be issued to the decedent and continue to yield him a stipulated sum for the balance of his life.

The new contract, arising in his sole favor upon the surrender by the wife of that which is now before the Court, would have called for a slightly lower annual benefit to the husband, the decedent. It might, therefore, be asserted, but without justification, that the husband retained the right to this difference of income, amounting to $106.25 per annum, from the property which the Commissioner has included as taxable in his gross estate. Certainly the income payable to the husband under the fresh annuity contract which would have been issued had the wife surrendered the original contract, namely, $280.26 a year, is wholly separate from the property which has been taxed, for it continues notwithstanding the withdrawal of the so-called "death benefit" by the wife and the elimination of that portion of the principal from any ability to contribute income.

But the following considerations show, we submit, that the decedent had no right to enjoy any income derived from any portion of the property:

(a) That he had no *right* to income attributable to that portion of the principal which the wife could unrestrictedly withdraw is a necessary conclusion from the fact that she could by herself eliminate that part of his annuity by the mere act of surrendering the

contract and withdrawing the "death benefit". It seems clear that a "right" implies an enforcible interest. By the very terms of the contract this element of the annuity could be blotted out by the wife; her doing so would invade no right since the power is granted her specifically.

(b) The balance of the annuity, to which he would be entitled for life if she surrendered the contract, is obviously not derived from the principal which she had the power to draw down equally before or after his death; for her withdrawal of that principal would in no way affect it. It would flow from a new policy to be issued by the Society.

(c) She had powers which were even more persuasively inconsistent with the existence of any right to income on the part of the husband for, without surrendering the contract, she had the contractual authority, "subject to the Society's approval, to change to another form or plan of contract" the entire agreement bearing upon the annuity and the death benefit. There is no qualification upon this except the Society's approval. The decedent could not have blocked her action. It is apparent that it was in her power, therefore, so to amend the contract during the decedent's lifetime, without a surrender of the original document, as to eliminate entirely the annuity feature. It seems, therefore, idle to speak of any "right to the income from the property" when, whatever annuity was paid to him was not the result of any right to demand it on his part but the mere sufferance of his wife.

(d) Fundamental, however, is the question whether an annuity paid under a contract is *income derived from the property*—whether "income from the property" does not apply to its earnings rather than to a stipulated amount,—possibly more, possibly less, but wholly unlikely to be the same as the contractual sum periodically due. The Board of Tax Appeals in *Clise*

v. *Commissioner* (41 B. T. A. 820), answered this question in the negative, writing on page 824:

> "The property (money) which she was 'transferring' was irretrievably gone and for it she was getting a promise of an annuity, payment of which was not limited or related to income from the consideration which she paid, but was to be paid at all events."

The decision of the Board, although reversed on the ground that the decedent had retained an interest in the property transferred, was left undisturbed on the subject of income (122 Fed. (2d) 998). Seemingly of the same opinion are

> *Matter of Kohler*, 193 App. Div. (N. Y.) 8, 20;
> *Peek* v. *United States*, 38 Fed. Supp. 826, 827;
> *Matter of McComb*, 4 Bradf. 151.

Assuming that there was a retention of "the right to the income", it was not for the decedent's life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death.

If there was a "right", it could have been terminated at any time by the wife. Such a right will not meet the statutory definition. As to this, the intention of Congress is made clear by the reports of the Senate Finance Committee on the Revenue Bill of 1932 when this feature was adopted. The pertinent portions read as follows:

> "The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

"The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter."

Here the measure of time had no reference to his life. It was that period only during which the wife might choose to allow the annuity to continue.

## Conclusion

No element implied or specified in Sec. 811(c) served to fasten to the decedent a tie to the property which would serve to render it part of his estate at death. It was error to include it in his gross estate. The judgment below should be reversed and the prayer of the complaint granted.

March 12, 1945.

Respectfully submitted,

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## Appendix I

Section 302(c) of the Revenue Act of 1926, being Section 811(c) of the Internal Revenue Code.

(as amended by the Joint Resolution of March 3, 1931.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) *To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise,* in contemplation of or *intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property,* or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; *except in case of a bona fide sale for an adequate and full consideration in money or money's worth.* Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * * * * * *

*Treasury Regulation 80:*

Art. 17 [as amended by T.D. 5008, 1940-2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*— The statutory phrase "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death

(other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or

otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106 [Ct. D. 1440, C. B. 1940-1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938-2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—

*Appendix I*

Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

## Appendix II

Pertinent Provisions of Contract No. 9,168,545 (Life)

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Numbers in parenthesis indicate photostatic pages.

SUCCESSIVE OWNERS: The rights of Owner under the terms of this policy are vested in BEATRICE L. GOLDSTONE, wife of said MORRIS L. GOLDSTONE, only during her lifetime. Upon the death of said BEATRICE L. GOLDSTONE, prior to the death of said MORRIS L. GOLDSTONE, the said rights of Owner shall vest in said MORRIS L. GOLDSTONE. (2)

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The proportion of divisible surplus accruing upon this policy shall be ascertained annually. At the end of thhe first and each subsequent policy year any surplus apportioned by the Society to this policy as a Dividend shall, at the option of the Owner be:

1. Paid in cash; or
2. Applied to the purchase of paid-up Additional Insurance, and the Owner may at any time surrender such Additional Insurance and receive the cash value thereof which shall not be less than the original cash dividend; or
3. Left to accumulate at 3% interest, compounded annually, and if in any year the Society declares that funds held under this Option shall receive interest in excess of 3% per annum the accumulation hereunder shall be increased by an Excess Interest Dividend in an amount to be determined and apportioned by the Society. Any dividend accumulations under this Option will be payable to the Owner on demand on any anniversary of the Register date of this policy. (3)

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*Appendix II*

SPECIAL BENEFICIARY. If there is no written assignment of this policy in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Owner may while this policy is in force designate a special beneficiary or beneficiaries who shall be entitled to receive the net sum due upon the death of the insured and may from time to time change such beneficiary or beneficiaries. Such designation or change of special beneficiary shall be made by written request, upon the Society's blank, filed at its Home Office, but shall take effect, only upon the endorsement of the same hereon by the Society. (4)

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The Owner (or assignee if any) while vested with the rights under the terms of this policy may, without the consent of the Insured, special beneficiary or any subsequent successive Owner, surrender, assign or pledge this policy and all rights hereunder or, subject to the Society's approval, change to another form or plan of insurance. An assignment by the Owner shall operate to exclude any and all rights of the Insured, special beneficiary or any subsequent successive Owner under this policy except that upon release of all outstanding assignments or upon reassignment to the Owner all rights under this policy shall be the same as if such assignments of said policy had not been made and that if assigned or pledged as collateral only by the Owner, the rights of the Insured, special beneficiary and any subsequent successive Owner shall be as set forth in this policy subject to such collateral assignment or pledge. (4)

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LOANS. The Society, at any time while this policy is in force, will advance to the Owner on proper assignment

of this policy and on the sole security hereof, at 6% interest per annum payable annually on the anniversary of the Register date a sum which, with interest for the then current policy year, shall not exceed the cash value as stated in the following table. Interest if not paid when due shall be added to the existing loan and bear interest at the same rate. If the advance is for a purpose other than to pay premiums on policies in the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such advance or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Owner, and to the assignee of record, if any, at their addresses last known to the Society.

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CASH SURRENDER VALUE. This policy, after being inforce for one year, may be surrendered by the Owner for its cash value, as shown in the opposite table.

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No option of settlement elected by the Owner hereunder can be changed nor can any payment thereunder be commuted, except by the Owner's written order filed with the Society at its Home Office. ("Modes of Settlement Rider".)

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PAYMENT AS MATURED ENDOWMENT. Whenever during the lifetime of the insured the reserve on this policy and on any dividend additions together with any dividend accumulation equals the face amount hereof, the Society, upon surrender of this policy with due release, will re-

gard this policy as a matured Endowment and will pay to the Owner the face amount of insurance hereunder less any indebtedness. (3)

MODES OF SETTLEMENT AT MATURITY OF POLICY.

The Owner may elect to have the net sum due and special beneficiary under said policy upon its maturity applied under one or more of the following optional modes of settlement in lieu of the lump sum provided for on the first page thereof, and in the absence of such an election by the Owner, the special beneficiary, after the Insured's death, may so elect. (Rider.)

## Appendix III

Pertinent Provisions of
Contract #9,168,544 (Annuity).

The Equitable Life Assurance Society of the United States * * * hereby agrees to pay at its home office in the City of New York to Morris L. Goldstone (herein called the Annuitant) an annuity subject to the conditions hereinafter stated, in semi-annual payments of $368.51, each commencing with the twenty-eighth day of December, 1933, if the Annuitant is then living, and terminating with the last payment preceding the death of the Annuitant.

If the Annuitant dies while this contract is in force, the Society further agrees upon receipt of due proof of the Annuitant's death and the surrender of this contract, properly released, to pay to the beneficiaries as named in the Special Provision attached hereto, dated July 27th, 1933, and in accordance therewith, (with the right of the Annuitant's wife, Beatrice L. Goldstone, herein called the purchaser, during her lifetime and after her death, the Annuitant to change the beneficiary or assign this contract) Six Thousand and Seventy-one and 46/100 Dollars (herein called the death benefit), together with an additional sum equal to a fractional part of the Annuity payment proportionate to the period elapsed between the due date of the last Annuity payment made and the date of the Annuitant's death.

* * * *

The Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death the Annuitant, without the consent of the beneficiary, may surrender this contract to the Society at any date upon which an annuity payment is due thereunder, and upon such surrender the Society, in addition to making the annuity payment then due, will

1) pay to the Purchaser or, after her death, the Annuitant, a cash surrender value of an amount equal

to the death benefit provided for above and will

2) issue to the Annuitant a paid-up non-participating Life Annuity Contract providing for Annuity payments of the reduced amount of Two Hundred Eighty and 26/100 Dollars cash, etc.

SPECIAL PROVISION:

The Purchaser (or assignee, if any, of all rights under this contract) may, without the consent of the Annuitant or beneficiary, surrender, assign or pledge this contract and all rights hereunder or, subject to the Society's approval, change to another form or plan of contract. An assignment of all rights under this contract by the Purchaser shall operate to exclude any and all rights of any beneficiary, or Annuitant under this contract except that upon release of all outstanding assignments or upon reassignment to the Purchaser all rights under this contract shall be the same as if such assignments of said contract had not been made and that if assigned or pledged as collateral only by the Purchaser, the rights of the Annuitant or beneficiary shall be as set forth in this contract subject to such collateral assignment or pledge. (2)

If the Purchaser be not living, and if there be no written assignment of this contract in force and on file with the Society, then the Annuitant (or assignee, if any, of all rights under this contract) may, without the consent of the beneficiary, surrender, assign or pledge this contract and all rights hereunder, or, subject to the Society's approval, change to another form or plan of contract. An assignment of all rights under this contract by the Annuitant shall operate to exclude any and all rights of the beneficiary under this contract except that upon release of all outstanding assignments or upon reassignment to the An-

nuitant all rights under this contract shall be the same as if such assignments of said contract had not been made and that if assigned or pledged as collateral only by the Annuitant, any equity remaining at the death of the Annuitant shall accrue to the beneficiary. (2)

PARTICIPATION IN DIVIDENDS. The proportion of divisible surplus accruing upon this contract shall be ascertained annually. At the end of the first and each subsequent contract year any surplus apportioned by the Society to this contract as a Dividend shall, at the option of the Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death, the Annuitant, without the consent of the beneficiary, be

1. Paid in cash; or
2. Left to accumulate at 3% interest, compounded annually, and if in any year the Society declares that funds held under this Option shall receive interest in excess of 3% per annum the accumulation hereunder shall be increased by an Excess Interest Dividend in an amount to be determined and apportioned by the Society. Any Dividend accumulations under this Option will be payable to the Purchaser, or after her death, the Annuitant upon surrender of this contract or on demand on any prior anniversary of the Register date of this contract. (3)

LOANS. The Society, at any time while this contract is in force, will advance to the Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death, the Annuitant, without the consent of the beneficiary, on proper assignment of this contract and on the sole security hereof, a sum which with interest

for one year shall not exceed the death benefit, less, any existing indebtedness to the Society on this contract. Interest shall be at the rate of 6% per annum and shall be payable on each anniversary of the Register date hereof. Interest, if not paid when due shall be added to the existing loan and bear interest at the same rate. If the advance is for a purpose other than to pay premiums on policies in the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay any advance or to pay interest thereon shall not avoid this contract unless the total indebtedness hereon shall equal or exceed the Death Benefit, nor until thirty-one days after notice shall have been mailed to the Purchaser, or after her death, the Annuitant, and to the assignee of record, if any, at their addresses last known to the Society. (3)

BENEFICIARY. If there is no written assignment of this contract in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Purchaser, during her lifetime, and after her death, the Annuitant, may from time to time, by written notice duly filed at the Society's Home Office, change the beneficiary, but such change shall take effect only upon its endorsement on this contract by the Society. (3)